constitutional function of the courts is not only to interpret but also to enforce the laws enacted by Parliament. In enforcing the law we must be the first to obey it. It should be noted that the power of a Court to proceed in a particular course of administering justice, was one of substance and not merely of form. The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. The Court has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. It seems to us to be unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature. [See Lord Chelmsford in *R* v. *Hughes*(1) and Lord Macnaghten in *Vacher & Sons* v. *London Society of Compositors*(2)].

Appeal dismissed.

Solicitors: *Ng Ek Teong & Partners; Azman, Davidson & Co.*

TOH KIAN HIN v. TING DING WOI & ANOR.

[O.C.J. (Chong Siew Fai J.) May 22, 1984]

[Sibu – Originating Summons No. 57 of 1983]

Land Law – Caveat – Removal of – Serious question to be tried – Allegation of fraud.

In this case the plaintiff applied for an order of removal of the caveat lodged by the defendants against his land comprised in Sibu Lease of Crown Land No. 43376 and registered at Sibu Land Registry Office on May 26, 1983 as Sibu Instrument No. L.2300/1983. The land initially belonged to one John Ting Yew Chung (deceased) who was the father of the defendants. After the death of the deceased on September 18, 1979, letters of administration in respect of the deceased's estate which included the land was granted to the defendant's eldest brother Ting Ting Giong. Having transmitted the land to himself as representative of the deceased's estate on February 11, 1981 *vide* Sibu Instrument No. L.472/81, Ting Ting Giong transferred the land to one Ting Siong Hung as "beneficiary" of the deceased's estate. Later Ting Siong Hung sold the land to the plaintiff for $15,000. The plaintiff intended to use the land as security for a loan when he discovered the caveat.

Held: (1) fraud in an action seeking to affect a registered interest means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud. If the designed object of a transfer is to cheat a man of a known existing right, that is fraudulent, but the act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest;

(2) in this case, there was no evidence on record indicating that the plaintiff had or should have suspected anything fishy thereby saddling him with the obligation to inquire;

(3) the court was not satisfied that as against the plaintiff there was a serious question to be tried. The said caveat should therefore be removed forthwith.

Cases referred to:

(1) *Eng Mee Yong & Ors.* v. *Letchumanan* [1979] 2 M.L.J. 212, 215.

(2) *Nanyang Development (1966) Sdn. Bhd.* v. *How Swee Poh* [1970] 1 M.L.J. 145.

(3) *Kasivisvanathan Chettiar* v. *Pereira* [1976] 2 M.L.J. 110.

(4) *Waimiha Sawmilling Co. Ltd.* v. *Waione Timber Co. Ltd.* [1926] A.C. 101, 106 & 107.

(5) *Assets Co. Ltd.* v. *Mere Roihi* [1905] A.C. 176.

(6) *Bagher Singh* v. *Chanan Singh & Anor.* [1961] M.L.J. 328.

ORIGINATING SUMMONS.

Lawrence Lai for the plaintiff.

Teo Chong Lee for the defendants.

Cur. Adv. Vult.

Chong Siew Fai J.: This is an application of the plaintiff for an order of removal of the caveat lodged by the defendants against his land comprised in Sibu Lease of Crown Land No. 43376 ("the land") and registered at the Sibu Land Registry Office on May 26, 1983 as Sibu Instrument No. L.2300/1983 (the caveat).

The background, so far as relevant to this case, leading to the institution of these proceedings may be briefly stated as follows. The land initially belonged to one John Ting Yew Chung (deceased) who was the father of the defendants. After the death of the deceased on September 18, 1979, letters of administration in respect of the deceased's estate, which included the land, was granted to the defendants' eldest brother Ting Ting Giong. Having transmitted the land to himself as representative of the deceased's estate on February 11, 1981 *vide* Sibu Instrument No. L.472/81 (see Exhibit "A" annexed to the plaintiff's affidavit affirmed on November 9, 1983), Ting Ting Giong transferred the land to one Ting Siong Hung as 'beneficiary' of the deceased's estate vide Sibu Instrument No. 473/81 registered on February 11, 1981 (see Exhibit "A" referred to above). According to a Memorandum of Transfer registered in the Sibu

Land Registry Office as Instrument No. L.3752/1982 on September 15, 1982, Ting Siong Hung sold the land to the plaintiff for $15,000/-. (see Exhibit "C" annexed to the plaintiff's said affidavit). In his affidavit the plaintiff said he purchased the land in good faith for $15,000/-. He further said that it was when he intended to use the land as security for a loan on or about May 4, 1983 that he discovered that the defendants had lodged the caveat. Hence this application.

In an application of this nature, the plaintiff being the registered owner of the land, the onus is on the defendants/caveators to satisfy the court that there are sufficient grounds in fact and law for allowing the caveat to remain in force. *Eng Mee Yong & Ors.* v. *Letchumanan*[1], *Nanyang Development (1966) Sdn. Bhd.* v. *How Swee Poh*[2] It is, however, not necessary for the defendants to satisfy the court that their claim against the plaintiff in Civil Suit No. 63 of 1983 which they have commenced, will on balance of probabilities, succeed. That would be placing too high a burden upon the defendants. See *Eng Mee Yong's* case, *supra*. Counsel for the defendants. cited *Kasivisvanathan Chettiar* v. *Pereira.*[3] That case must be read in the light of what had been said about it in *Eng Mee Yong's* case, *supra*, where Lord Diplock in delivering the judgment of the Board said:

> "..... if *Kasivisvanathan Chettiar* v. *Pereira* [1976] 2 M.L.J. 110 might be understood as suggesting that the first requirement would be satisfied by the facts that (i) the caveator had commenced proceedings against the caveatee to enforce his claim to an interest in the land, coupled with (ii) his bare assertion in an affidavit that he was entitled to that interest unsupported by any disclosure and verification upon oath of the facts upon which his claim was based, this would put the burden on the caveator too low."

The first requirement referred to is the requirement of the existence of a serious question to be tried.

Section 132(1) of the Land Code provides that a registered proprietor of any interest in land shall hold such interest subject to the interests noted on the Register but free from all other interests except interests as enumerated in items (a) to (f) of the said section 132(1) and except in the case of fraud. In the instant case there is no evidence of any interest adverse to the plaintiff noted in the Register on the date of registration of the Memorandum of Transfer L.3752/1982 on September 15, 1982 in favour of the plaintiff (see also the said Exh. "A"), nor is it the case of the defendants that any of the interests enumerated in items (a) to (f) of the said section 132(1) subsisted and was applicable. There is, however, an allegation of fraud. It is therefore necessary to examine the affidavit and the material of the defendants in this respect as against the plaintiff who had affirmed that he was a *bona fide* purchaser of the land for value. In this connection, it is necessary to bear in mind that whatever allegations of fraud or other matters by the defendants against the administrator Ting Ting Giong and/or Ting Siong Hung are against the latter or any of them only, and are separate and distinct and have no connection with and ought not be imputed on the plaintiff, unless there exists a clear allegation implicating the plaintiff. What then are the allegations of the defendants? They asserted that their brother-administrator Ting Ting Giong had fraudulently transferred the land to Ting Siong Hung who, according to them, was not a beneficiary of the deceased's estate. As against the plaintiff, all the defendants said in their evidence is that he was their neighbour and knew that the property belonged to the deceased and should have made inquiry before buying it from their brother-administrator who, they alleged, had acted *ultra vires* and fraudulently transferred the land to the plaintiff. There is, on record, no evidence alleging fraud on the part of the plaintiff. Neither is there evidence or suggestion that the plaintiff knew of the alleged fraud of Ting Ting Giong and/or Ting Siong Hung, assuming that such fraud existed. Section 133(1) of the Land Code provides that no person who takes a transfer from a registered proprietor shall, except in the case of fraud, be concerned to ascertain the circumstances under which such proprietor or any previous proprietor was registered or be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding. And section 133(2) of the Land Code enacts that the knowledge of the existence of any trust or unregistered interest shall not of itself be imputed as fraud for the purpose of section 133.

Fraud in an action seeking to effect a registered interest means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud. If the designed object of a transfer is to cheat a man of a known existing right, that is fraudulent, but the act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest. See *Waimiha Sawmilling Co. Ltd.* v. *Waione Timber Co. Ltd.*[4]. In *Assets Co. Ltd.* v. *Mere Roihi,*[5] which was cited in *Waimiha's* case, *supra*, Lord Lindley said at page 210:

"The mere fact that he might have found out fraud if he had been more vigilant, and had made further enquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him."

In our instant case, there is no evidence on record indicating that the plaintiff had or should have suspected anything fishy thereby saddling him with the obligation to inquire.

Bagher Singh v. *Chanan Singh & Anor.*[6] was a case on section 42 of F.M.S. Land Code 1928 (Cap. 138). There it was held that a transferee would not have his title defeated where he was not a party to the fraud of the transferor who had deliberately transferred the land for value to defeat his (the transferor's) creditors. In my view, the same principle holds good in our instant case.

Moreover, quite apart from the element of fraud, the allegation of the defendants, that the plaintiff bought the land from the administrator (as opposed to Ting Siong Hung) and that the administrator transferred the land to him (in paragraph 9 of their affidavit made on February 18, 1984), is not supported by the documentary evidence Exh. "A" and Exh. "C" annexed to the plaintiff's affidavit affirmed on November 9, 1983 and runs counter to their own evidence in paragraph 6 of their said affidavit. In fact the said Exh. "A" and Exh. "C" substantiated the plaintiff's assertion that he bought it from Ting Siong Hung. The fact that the defendants have instituted an action (Suit No. 63 of 1983) claiming, *inter alia*, for the revocation or rescission of the transfer of the assets of the deceased's estate is only one of the factors to be considered. The weight to be attached thereto must be assessed in the light of all the contentions and evidence of the defendants against the plaintiff respecting which I have already referred. The plaintiff in this case was made the 3rd defendant in Civil Suit No. 63 of 1983 instituted by the defendants. Although the indorsements in the Writ of Summons in the said Suit claim, *inter alia*, for revocation or rescission of transfer of the deceased's estate by Ting Ting Giong as administrator and by the plaintiff as the 3rd defendant and two other co-defendants "for conspiracy and fraud," all that was alleged against the plaintiff was no more than that the plaintiff was a neighbour of the defendant's family who knew that the property he purchased was one of the estates of the deceased. There is no allegation of fraud against the plaintiff in the Statement of Claim in the said Suit. In fact the defendants themselves asserted in the Statement of Claim that Ting Siong Hung transferred the land to the plaintiff for $15,000/-. (See Exh. "A" annexed to Teo Chong Lee's affidavit affirmed on April 24, 1984 particularly indorsement (b) in the Writ of Summons and paragraph 4 of the Statement of Claim).

Section 134(2) of the Land Code provides:

"Nothing in this Code shall be so construed as to place in doubt the title of any person who is a purchaser in good faith and for value of any interest, and who is registered as the proprietor of such interest, on the ground that the registered proprietor through or under whom he claims was registered as proprietor through fraud or error, whether such fraud or error consisted in a misdescription of the land or otherwise."

On the evidence and the materials before me, I am not satisfied that as against the plaintiff there is a serious question to be tried. The application is allowed with costs to the plaintiff. There shall be an order that the caveat lodged by the defendants against the land and registered in the Sibu Land Registry Office as Sibu Instrument No. L.2300/1983 on May 26, 1983 be forthwith removed.

Application allowed.

Solicitors: *Battenberg & Talma; Teo & Co.*

PUBLIC PROSECUTOR v. PETER TING CHIONG KING

[A.Cr. J. (Chong Siew Fai J.) November 10, 1984]

[Sibu – Criminal Appeal No. 23 of 1982]

Criminal Law and Procedure – Sentence – Whether sentences of whipping can be concurrent – Criminal Procedure Code (F.M.S. Cap. 6), ss. 282(d) & 292(i).

In Criminal Case No. 16 of 1982, the respondent Peter Ting Chiong King was convicted of robbery and was sentenced, *inter alia*, to 5 strokes of the rattan. In another Criminal Case No. 17 of 1982 arising from which the present appeal is brought, the respondent was again convicted of another offence of the same nature and was sentenced, *inter alia*, to 5 strokes of the rattan. The learned President of the Sessions Court ordered that the 2 sentences of whipping should run concurrently. The Public Prosecutor appealed contending that the sentences of whipping could not be concurrent and that it was wrong to so order.